Supreme Court, U. S.
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No. 96-203

In The

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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I.

FEDERAL RULE OF CRIMINAL PROCEDURE 52(b) IS NOT THE EXCLUSIVE AUTHORITY FOR REVIEW OF AN ERROR NOT SUBJECT TO OBJECTION AT TRIAL.

The Government contends that Fed.R.Crim.P. 52(b) is the exclusive authority for review of "error" to which a defendant did not object at trial. Resp. Br. 9-17. The Government is wrong. Before adoption of the Federal Rules of Criminal Procedure in 1944, the Court recognized its inherent power to correct errors that occurred without objection. *See, e.g., Wiborg v. United States*, 163 U.S. 632, 658 (1896); *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Furthermore, even after adoption of the Rules, the Court did not rely on a rule or statute in fashioning the harmless error standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967). *See, id.* at 46 (Harlan, J., dissenting).[1] The Court has even recently recognized that provisions other than Rule 52(b) may authorize correction of an error not raised at trial. *United States v. Olano*, 507 U.S. 725, 732 (1993) (issue not raised in *Olano*).

For example, the Government overlooks 28 U.S.C. §2106.[2] In *Grosso v. United States*, 390 U.S. 62 (1968), the

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[1] *See also*, R. Traynor, *The Riddle of Harmless Error* 42 (1970).

[2] "§2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

petitioner had not raised a claim that would have been futile under binding precedent at the time of trial but became meritorious in light of a change in law rendered on the same day as the Court decided *Grosso*. *Id*. at 71; *see also*, *Marchetti v. United States*, 390 U.S. 39 (1968). The Court concluded that, in the face of prior binding precedent, Grosso's failure to raise the issue did not constitute waiver, and expressed doubt that the newly-visible error could be reached under a plain error analysis. *Grosso*, 390 U.S. at 71. The Court, however, invoked the authority of 28 U.S.C. §2106 to reverse the conviction previously entered and affirmed on appeal. *Id*. Accordingly, the Government simply is wrong in its assertion that Fed.R.Crim.P. 52(b) constitutes the exclusive authority or standard for review in this case.

Additionally, Rule 52(b) is inapplicable to this case. Rule 52(b) governs review where a "right" has been "forfeited." *Olano*, 507 U.S. at 732. Rule 52(a) generally governs review of non-forfeited errors. *Id*. at 731. However, no "right" existed at all to a jury determination of the materiality element of any perjury offense in any circuit other than the Ninth Circuit prior to the Court's decision in *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). *See*, *United States v. Gaudin*, 28 F.3d 943, 955-58 (9th Cir. 1994) (Kozinski, J., dissenting) (citing cases). One cannot "forfeit" what one does not have at the time of the purported "forfeiture."[3] The "right" of

[3] "Forfeit" is defined as loss of a thing or right by error, fault or crime. Black's Law Dictionary 650 (16th ed. 1990); 5 Oxford English Dictionary 448 (1971). Clearly, where more than a half century of binding precedent in the petitioner's circuit, as well as all but one other circuit, rendered entirely futile and frivolous a *Gaudin* objection at the time of petitioner's trial, petitioner's failure to have been prescient of this Court's subsequent decision in *Gaudin*, and concomitant failure to raise the issue at the time of her trial, clearly cannot be characterized as "error" or "fault" of petitioner or her counsel.

petitioner to have the jury determine materiality in her trial simply did not exist at the time.[4]

Furthermore, "forfeiture," to which Rule 52(b) applies, simply is not presented in this case. "Some rights may be forfeited by means short of waiver . . . but others may not. . . . " *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted). Among the rights that cannot be forfeited short of actual waiver is the right to trial by jury. *Id*. (Scalia, J., concurring), *citing*, *Patton v. United States*, 281 U.S. 276 (1930); *see also*, Pet. Br. 16-17, 24; Fed.R.Crim.P. 23(a).

The inescapable result is that Fed.R.Crim.P. 52(b) has no application to this case because the petitioner did not "forfeit" the right to a jury determination of the materiality element of the perjury offense charged in this case. At the time of trial, no such "right" even existed in petitioner's circuit for more than half a century prior to the petitioner's trial. *See*, Pet. Br. 26-27. As a result, application of the contemporaneous objection rule, Fed.R.Crim.P. 30, and the concomitant standard for

[4] The "error" in this case was not even "error" at the time of petitioner's trial. *See infra*, at 4-6.

review of a "forfeited" "right" under Fed.R.Crim.P. 52(b), simply are not implicated in this case.[5]

The Government solicits an explanation for why petitioner could not have raised the issue presented at trial in light of the Ninth Circuit's decision, shortly prior to her 1994 trial, in *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).[6] The Government's challenge is easily answered. First, the Ninth Circuit's *Gaudin* decision rendered that court a "maverick" among every one of its

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[5] Even the Government has recognized that the petitioner did not leave the materiality issue unchallenged, but rather sought judgment of acquittal based on insufficiency of the evidence to establish materiality. *See* Resp. Br. 5, 32, *citing*, 2A Tr. 109. Additionally, given the state of controlling law at the time of her trial, petitioner certainly cannot fairly be characterized, as the Government seeks to do, as having "simply elected not to" ask the district court to submit the materiality issue to the jury. Resp. Br. 15, n.5.

[6] The Government criticizes petitioner's failure to object not only because of the Ninth Circuit's *Gaudin* decision, but also because, at the time of petitioner's trial, the Government had petitioned this Court for a writ of certiorari in *Gaudin*. Resp. Br. 15. However, the pendency of the Government's petition for certiorari in *Gaudin* at the time of petitioner's trial is utterly meaningless for two reasons. First, it is beyond question that the Court grants certiorari in only a very small fraction of the cases in which a party seeks certiorari. *See e.g.*, R. Stern, et al., *Supreme Court Practice* 32-33 (7th ed. 1993). Second, if the pendency of the Government's petition for writ of certiorari in *Gaudin* has any significance at all, such significance is opposite to that urged by the Government; the Government's petition in *Gaudin* rendered the Ninth Circuit's decision subject to question. Stern, *supra* at 164 (certiorari granted in average of about 70 percent of cases in which Solicitor General seeks review).

sister circuits. *Gaudin*, 28 F.3d at 955 (Kozinski, J., dissenting). Second, the Ninth Circuit's position, at the time of petitioner's trial, would not have been remotely persuasive to a district court within the Eleventh Circuit given 55 years of binding Eleventh Circuit precedent.[7] *See*, Pet. Br. 26-27. In fact, the Eleventh Circuit had reaffirmed that materiality was a question of law for determination by the district court judge shortly prior to petitioner's trial. *See, United States v. Swindall*, 971 F.2d 1531, 1555 (11th Cir. 1992) (materiality is question of law subject to *de novo* review); *United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991) (materiality is question of law not to be submitted to the jury).

Third, the Ninth Circuit's *en banc* decision in *Gaudin* reaffirmed its precedent that materiality is for jury determination only with respect to 18 U.S.C. §1001 offenses, not the 18 U.S.C. §1623 offense at issue in this case. *Gaudin*, 28 F.3d at 945, 951. While the Ninth Circuit questioned the constitutionality of district judges deciding materiality in perjury cases generally, its holding was limited to §1001 cases. *Id.* at 948-49. Nowhere in its *Gaudin* decision did the Ninth Circuit overrule its prior holdings that materiality decisions in 18 U.S.C. §1623

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[7] District courts are required to follow precedent of their circuit unless a contrary decision of the Supreme Court intervenes. *See e.g., Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506, 1508-10 (11th Cir. 1987), *citing, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488 (1838); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). *See also, Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("decisions of one circuit are not binding on other circuits," and prior circuit decision may be overruled only by court of appeals *en banc*).

cases were reserved for the trial judge. *See, United States v. Prantil*, 764 F.2d 548, 557 (9th Cir. 1985); *United States v. Dipp*, 581 F.2d 1323, 1328 (9th Cir 1978); *United States v. Sisack*, 527 F.2d 917, 920 n.2 (9th Cir. 1975); *United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975); *Gaudin*, 28 F.3d at 955, 957-58 (Kozinski, J., dissenting) (criticizing *implicit* overruling of precedent that materiality is decided by trial judges under statutes other than §1001). The Ninth Circuit previously had specifically held its decision in *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), that materiality must be determined by a jury, was limited only to §1001 cases. *See United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir. 1984); *United States v. Larm*, 824 F.2d 780, 783 (9th Cir. 1987); *United States v. Clark*, 918 F.2d 843, 845-46 (9th Cir. 1990). As a result, the Ninth Circuit's decision in *Gaudin* was legally meaningless in the Eleventh Circuit (and every other circuit besides the Ninth, and there only in §1001 cases) at the time of petitioner's trial. Principled lawyering precluded petitioner's counsel from making the trial objection demanded by the Government.

II.

THE CONTEMPORANEOUS OBJECTION RULE AND RELATED PLAIN ERROR STANDARD OF REVIEW CANNOT APPLY WHERE PREVENTING THE JURY FROM DECIDING MATERIALITY WAS NOT EVEN "ERROR" AT THE TIME OF PETITIONER'S TRIAL.

As set forth above, the so-called "error" in the petitioner's case was compelled by binding precedent at the time of her trial in every circuit other than, perhaps, the

Ninth Circuit. The contemporaneous objection requirement of Fed.R.Crim.P. 30 therefore simply is inapplicable in this case. Perhaps if the state of the law had actually been unclear at the time of her trial, petitioner could be faulted for not having objected to the trial judge deciding materiality. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (reserving decision on "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified."). At the time of petitioner's trial, though, the law was not unclear but rather was crystal clear that the determination of the materiality element of a perjury charge was reserved for the trial judge. The only standard that can properly be applied is that of *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), and application of the *Griffith* rule requires reversal of the petitioner's conviction.[8]

The Government protests that inquiries as to whether a pertinent legal principle was clear or unclear at a given time would constitute "amorphous" analyses that would "mire the courts of appeals in indeterminate inquiries." Resp. Br. 15, 21. The Government's argument is a fallacy. First, "the very essence of judicial duty" is "to say what

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[8] Additionally, *Griffith* and *Linkletter v. Walker*, 381 U.S. 618 (1965), prohibit application of a plain error standard that considers only the plainness or clarity of error at the time of trial, contrary to the standard urged by the United States. Resp. Br. 19-22. In fact, the Government's position is internally contradictory to the extent that it protests against a requirement of inquiry into the legal futility of an objection at the time of trial, Resp. Br. 15, 21, while somehow contending that determination of whether an error was "plain" at the time of trial would constitute an inquiry of any greater judicial ease, Resp. Br. 22.

the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). Furthermore, courts often are required to determine what the law was at a particular point in time in determining, for example, whether collateral relief from a conviction is warranted where the collateral review petitioner appears to rely on a new rule of law not in existence at the time of trial. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990). The same inquiry is required to determine whether a governmental actor is entitled to qualified immunity from suit based on whether the right the official is accused of violating was clearly established at the time of the conduct at issue. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The Government's protestations of appellate difficulty fall of their own weight.

The Government's contention that the principle of *Griffith v. Kentucky*, 479 U.S. 314 (1987), is inapplicable to aid the petitioner also fails on its face. First, the Government argues incredibly that the "[p]etitioner has no special claim to more favorable treatment" than a petitioner seeking collateral relief under *Gaudin*. Resp. Br. 23-24. Such an argument is patently wrong. *Compare, Griffith*, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past") *with Teague v. Lane*, 489 U.S. 288 (1989) ("new rule" generally not a basis for relief on collateral review); *see also, Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (burden of showing prejudice from

erroneous jury instruction greater on habeas corpus petitioner than burden of establishing plain error on direct appeal).

Furthermore, the Government misleadingly argues that the petitioner is not entitled to the relief otherwise required by *Griffith* because she did not object at her trial, while the petitioners in *Griffith* did object to the error in that case. Resp. Br. 24. The Government, however, mistakenly contends that the petitioner must be situated similarly to the *Griffith* petitioners in order to obtain relief. That is the wrong comparison.

The defendant similarly situated to the petitioner in this case is Michael E. Gaudin, who secured relief in this Court from the trial judge having determined materiality in his false statements case, *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), even though "Gaudin did not object to the instruction that removed the question of materiality from the jury." 28 F.3d at 951.[9] The petitioner in this case, pursuant to the *Griffith* rule, is entitled to the benefit of *Gaudin* because she is similarly situated to Mr. Gaudin.

> The fact that the new rule may constitute a clear break with the past has no bearing on the actual inequity that results when only one of many similarly situated defendants receives the benefit of the new rule.

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[9] In *Gaudin*, the Government did not challenge the Ninth Circuit's holding of plain error, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 458 (Rehnquist, C.J., concurring), in light of prior Ninth Circuit precedent that materiality is determined by the jury in a §1001 case. *See supra*, at 5-6.

Griffith, 479 U.S. at 327-28 (citation and internal quotation omitted). The "integrity of judicial review requires" application of such a new rule "to all similar cases pending on direct review." *Id.* at 323. As the Court, speaking through Chief Justice Marshall, held in one of its earlier cases:

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, lawful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801). Under these principles, the judgment below should be reversed.

III.

THE GOVERNMENT'S CHARACTERIZATIONS OF WHAT IS "TECHNICAL" AND WHAT IS "EGREGIOUS" ARE WRONG.

The Government misdescribes errors that fairly can be considered mere technicalities and those that are egregious. The Government argues that the error in this case was "unimportan[t]," Resp. Br. 25, "technical," Resp. Br. 33, *quoting United States v. Keys*, 95 F.3d 874, 883 (9th

Cir. 1996) (Kleinfeld, J., dissenting), and "not so 'egregious,' " Resp. Br. 22, 35. The Government's characterizations of the *Gaudin* error at issue are backwards.[10]

First, the Government contends that the *Gaudin* error presented cannot be described as egregious because, at the time of petitioner's trial, withholding the materiality element of a false statement case from the jury was accepted in all but one federal circuit, *see Gaudin*, 28 F.3d at 955 (Kozinksi, J., dissenting) (collecting cases), even though that practice violated defendants' rights to due process of law and trial by jury. *Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453-58 (1995). The Court previously has rejected the Government's argument in this regard, in reliance on supposed historical practice. *Id.* at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453.[11] Second, the

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[10] The absence of a constitutionally complete verdict, as presented in this case, cannot be cured or overcome by a technical nicety of a procedural rule. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void."). *See* Pet. Br. 22-23, 31 n.9, 35-36. *See also, e.g., Weiler v. United States*, 323 U.S. 606, 611 (1945) (reviewing judges may not constitutionally substitute their judgment for that of a jury on a question constitutionally reserved for the jury).

[11] The Government even makes the demonstrably false assertion that withholding materiality from the jury "enjoyed the approval of . . . the highest court in the land . . . " Resp. Br. 25. This Court, however, has addressed the issue on only one occasion and concluded that criminal defendants have an unqualified right for a jury determination of materiality under a standard of proof beyond a reasonable doubt. *Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444. This Court at no time approved withholding the essential element of materiality from the jury in a perjury case. In fact, the case on which the government relies, *Sinclair v. United States*, 279 U.S. 263 (1929),

egregiousness of the error is magnified, not minimized, by the breadth of its approval among the circuits prior to *Gaudin*.

The Government's argument that *Gaudin* error is merely technical and not egregious flies in the face of *Gaudin*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *In re Winship*, 397 U.S. 358 (1970), *Bollenbach v. United States*, 326 U.S. 607 (1946), and *Davis v. United States*, 160 U.S. 469 (1895). The Government's characterization further contravenes the plain language of Article III and the Fifth and Sixth Amendments, and, on the record in this case, is blatantly belied by the clear constitutional prohibition against even partial directed verdicts of guilt in criminal cases. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). *See also*, Pet. Br. 11-19 (discussing fundamental nature of right to trial by jury in criminal case); Jt. App. 72 (trial court instructing jury that government had prevailed on element of materiality). The error at issue in this case accordingly cannot be characterized as merely technical, but rather is clearly egregious.

The only "technicality" before this Court is raised by the Government in its effort to preclude relief for the petitioner. This technical issue is the contemporaneous objection requirement embodied within Fed.R.Crim.P. 30 and 51, and enforced by the strictures of Rule 52(b). Even

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involved *refusal* to answer "pertinent" questions, not answers given but alleged to have been false and material.

if issues of procedural default can be characterized in some situations as other than technical, that is not this case where the petitioner, at the time of trial, had no "right" to "forfeit" and, even if she can be described as having had the right at the time of trial, the right was incapable of forfeiture without actual waiver. *See supra*, at 2-4. Accordingly, the *Gaudin* error in this case not only is of such a nature as to preclude application of Rule 52(b) standards to petitioner but also is precisely the type of particularly egregious error that must be corrected even if the Rule 52(b) standards are deemed to apply.

IV.

REVIEW IN THIS CASE CAN ONLY BE FOR REVERSIBLE ERROR.

Because Fed.R.Crim.P. 52(b) standards simply are inapplicable to the *Gaudin* error presented in this case, only two potential standards of review remain. First, the issue presented may constitute straightforward structural reversible error incapable of review for harmlessness or prejudice under any standard of Rule 52. *See United States v. Wiles*, 102 F.3d 1043, 1060-61 (10th Cir. 1996). Second, even if Rule 52(a) is applicable, the fundamental error at issue simply can never be held harmless pursuant to *Sullivan v. Louisiana*, 508 U.S. 275 (1993), because of the absence of any verdict upon which analysis for harmlessness, or any sort of prejudice, can operate. *See United States v. Keys*, 95 F.3d 874, 880-81 (9th Cir. 1996).

The Government incredibly dismisses the significance of the partial directed verdict that occurred in the petitioner's trial. Resp. Br. 32-33 n.13; Jt. App. 72. The trial judge not only instructed the jury that it must not

consider the element of materiality, but affirmatively directed the jury that the Government had prevailed on one of the four elements of the charged offense. Such a partial directed verdict not only is necessarily prejudicial but also clearly removed from the jury any ability to find the existence of the facts predicate to materiality, utterly precluding the jury from ever having found "the existence of every fact necessary to establish every element of the offense beyond a reasonable doubt." *Carella v. California*, 491 U.S. 261, 266 (1989), *quoting In re Winship*, 397 U.S. 358, 363 (1970), and *Rose v. Clark*, 478 U.S. 570, 580-81 (1986). Additionally, while the Government cites authority supporting affirmance of a conviction where an omitted element necessarily has been found by the jury in some other manner, Resp. Br. 27-29, the Government has not even attempted to demonstrate that the jury in petitioner's trial otherwise necessarily found the existence of the element of materiality, particularly where the trial judge specifically told the jury not to do so because the judge had already done so. Jt. App. 72. The jury in petitioner's trial simply never, in any manner, found even a single predicate fact relating to materiality.

The Government further dismisses the petitioner's demonstration that the district judge determined materiality under a standard less than one of beyond a reasonable doubt. Resp. Br. 31-32 n.12. As with its approach to the impact of a partial directed verdict and its failure to explain any theory of how the jury necessarily found the existence of facts demonstrating materiality, the Government seeks to avoid these issues because it cannot prevail on these points. The relaxed standard of proof employed by the trial judge is self-evident from his language, Jt.

App. 66, and clearly contrary to the due process requirements set forth in *In re Winship*, 397 U.S. 358, 363 (1970).

Accordingly, the appropriate standard of review in this case is the direct review standard indicated in *Carella* and *California v. Roy*, ___ U.S. ___, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996).[12] In the absence of a jury finding of every fact necessary to establish each element of the offense beyond a reasonable doubt, a reviewing court simply lacks the constitutional authority to inquire into the existence of prejudice, *vel non*, under any Rule 52 standard of review. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). Furthermore, where, as in this case, the "omitted" element actually was subject to a directed verdict of which the jury was instructed, actual prejudice is established by the petitioner.[13]

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[12] The manner of review for the issues presented is most aptly that described similarly by the only two circuits to have squarely confronted the issues *en banc*. *See, United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) (*en banc*); *United States v. Wiles*, 102 F.3d 1043 (10th Cir. 1996) (en banc); Pet. Br. 25-32.

[13] The Government suggests that *Gaudin* does not improve the "accuracy" of trial verdicts or alter "bedrock procedural elements essential to the fairness of a proceeding." Resp. Br. 23 n.7 (citations omitted). That is flatly wrong. *See Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453 (1995); Pet. Br. 15-16. The Government inappropriately seeks in this case on direct review to litigate how *Gaudin* issues should be considered on collateral review. In any event, defendants' rights to trial by jury under a standard of proof beyond a reasonable doubt clearly are bedrock principles mandated to secure accurate trial results. *See* Pet. Br. 11-19; Kaufman, A Fair Jury – The Essence of Justice, 51 *Judicature* 88, 91-92 (October 1967) ("Trial before a jury of one's peers is one of a democratic society's primary techniques for achieving truth.").

V.

EVEN REVIEW UNDER FED.R.CRIM.P. 52(b) REQUIRES RELIEF.

The Government ignores the inquiry of whether the *Gaudin* issue in this case affected the petitioner's "substantial rights." Resp. Br. 29-30. That is because the Government, and the view of the court of appeals below, cannot prevail on the substantial rights inquiry. Furthermore, in this case, the substantial rights and discretion inquiries of Rule 52(b) are inextricably interrelated.[14]

Although the Court has held that prejudice is among the considerations of the inquiry of whether substantial rights were affected, *see Olano*, 507 U.S. at 734-35, that is not the only appropriate inquiry, *id.* at 735-37. The petitioner's substantial rights were affected directly by deprivation of her rights to due process of law and trial by jury, and freedom from even a partial directed verdict, secured by Article III and the Fifth and Sixth Amendments of the Constitution. Additionally, the petitioner suffered actual prejudice as a result of the directed verdict at trial. The determination by the court of appeals that the petitioner's substantial rights were not affected because of the weight of the evidence directly contravenes the principle that judges cannot weigh prejudice in the absence of a complete constitutional jury verdict because such an error simply is incapable of review for prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 279-80

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[14] Basic norms of constitutional adjudication require that plain error analysis consider the clarity of an error at the time of appellate adjudication on direct appeal. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); Pet. Br. 36-39; Pet. for Cert. 16-19.

(1993). Also, as set forth above, the directed verdict that occurred in petitioner's trial meets the burden under Rule 52(b) of demonstrating actual prejudice.

For like reasons, the error at issue seriously and negatively affects the fairness, integrity and public reputation of the judicial proceedings in this case. *See Olano*, 507 U.S. at 731. The trial proceeding was unfair because the petitioner was deprived of her rights to due process and trial by jury and was the victim of a partial directed verdict by the trial judge. The integrity of the trial process was critically undermined for exactly the same reasons. Finally, where judicially-endorsed violations of these core constitutional rights occurred in petitioner's trial and others, these deprivations clearly undermine the public reputation of the judicial process by subjecting to public question whether judicial mistake can result in the loss of a criminal defendant's clearly established rights to due process of law, trial by jury and freedom from directed verdict.[15]

Furthermore, the *Gaudin* issue in this case infected the entire trial process. The petitioner's entire trial would have been conducted differently had materiality been, at the time, subject to jury determination.

As the Government implicitly acknowledges, the only direct evidence that any of the petitioner's grand

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[15] The court of appeals' review in this case also undermines the fairness, integrity and public reputation of judicial proceedings by substituting appellate judges' views of the weight of the evidence for that of juries in violation of Article III and the Fifth and Sixth Amendments. *See* Pet. Br. 15-19, 21-22.

jury testimony was incorrect was the Government's evidence that the petitioner's beneficiary had died in 1982, in conflict with her testimony that she and her mother had received the funds in question from Gerald Talcott in "probably" 1985 or 1986. Resp. Br. 3-4; Jt. App. 7, 22-24. The petitioner's qualified answer to the grand jury regarding the date of receipt of the funds, in testimony given in 1993, many years after the date of receipt to which she testified, clearly is immaterial to any grand jury inquiry into the disposition of funds Earl Fields may have received from unlawful activities. The evidence presented by the Government, even in the light most favorable to the prosecution, *see* Resp. Br. 3-4, did not present a clear or overwhelming case of proof of actual falsity of the petitioner's grand jury testimony other than the clearly immaterial date discrepancy.

Additionally, nowhere in petitioner's testimony before the grand jury was she presented any direct opportunity to affirm or deny whether any of the funds for improvements to her home had come from Fields. Jt. App. 14-57. The trial jury may have decided that it did not believe the petitioner's testimony that the funds for the improvements came from Mr. Talcott without deciding whether it believed that those funds actually came from Mr. Fields. In other words, even if the petitioner's testimony that the funds at issue came from Mr. Talcott was false, if the funds actually came from a source *other* than Fields, the testimony would not be material in the least to the grand jury's specific inquiry as to the disposition of *Mr. Fields'* allegedly unlawful income. The grand jury was investigating Mr. Fields, Jt. App. 59-62, not

whether the petitioner had used funds from any source other than Mr. Fields to improve her home.

Furthermore, the petitioner had specifically acknowledged to the grand jury that Mr. Fields had provided approximately $27,000.00 to her to assist in the purchase of the real estate. Jt. App. 39, 48-49. The grand jury, accordingly, was provided by the petitioner with testimony that Mr. Fields had disposed of some money by providing it for investment in the real estate at issue. Whether Mr. Fields had provided a greater amount of money for the improvement of the property was not a material question capable of influencing the grand jury's decision whether to indict Mr. Fields on any charge relating to the disposition of his income. *See Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 449 (restating definition of "materiality").

The "error" in this case structurally infected the entirety of the trial process. The absence of a jury finding of materiality renders the verdict a nullity, incapable of judicial review for prejudice. Furthermore, actual prejudice to the petitioner resulted from the jury being given a directed verdict of guilt by the trial judge on an essential element of the offense charged. Accordingly, the judgment below must be reversed.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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